CHIN CHUN YEAN

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-265-2008]
1 JUNE 2010

LABOUR LAW: *Employment - Termination of employment - Termination before expiry of 5-year fixed term employment contract - Whether termination constituted dismissal with just cause and excuse - Whether termination in accordance with mutually agreed termination clause - Whether Industrial Court correct in holding dismissal with just cause and excuse - Whether judicial review application to be dismissed*

ADMINISTRATIVE LAW: *Judicial review - Decision of Industrial Court - Premature termination of fixed term employment contract with just cause and excuse - Whether termination in accordance with mutually agreed termination clause - Whether judicial review application to be dismissed*

The applicant had a five-year fixed term employment contract with the 2nd respondent company with a monthly salary of RM50,000. The contract had a termination service clause, *ie*, cl. 8, that provided for compensation in the event the applicant's employment was terminated before the expiry of the fixed term. The 2nd respondent subsequently underwent an integration process pursuant to a merger exercise with Celcom Mobile Sdn Bhd, as a result of which the 2nd respondent re-evaluated the applicant's remuneration and benefits package to ensure conformity to its like package provided to its employees. The 2nd respondent then issued a letter to the applicant setting out proposals to review the terms and conditions of his employment. In the letter it was stated that the proposals were necessary to achieve a harmonization of the terms and conditions of employment of senior management. The applicant responded *via* letter disagreeing with the proposals and put on record his discussion with the Group Chief Executive Officer wherein he was advised that arrangements would be made for the termination of his employment if he did not accept the proposals. It followed that the 2nd respondent issued a letter terminating the applicant's employment with compensation

for the balance of 38.5 months of the applicant's five-year fixed term employment. The Industrial Court concluded that the applicant's termination of employment was with just cause and excuse as it was exercised on contractual rights mutually agreed upon as per cl. 8 of the applicant's contract of employment. The applicant now applied for an order of *certiorari* pursuant to O. 53 of the Rules of the High Court 1980 to quash the award of the Industrial Court. The issue for determination was whether the premature termination of the applicant's employment constituted a dismissal without just cause and excuse.

Held (dismissing the application for *certiorari*):

(1) The early termination of the applicant's contract of employment was contemplated at the time the parties entered into the contract as per cl. 8 of the contract. Clause 8 was referred to as a "safety clause" by the applicant. It was not a termination clause simpliciter. It was a negotiated termination clause with a financial compensation worked on an agreed formulae. The termination was lawful and in accordance with the contract as mutually agreed. The contractual right to terminate, as explained by the 2nd respondent, was exercised on a genuine business reason. It was not a colourable exercise of power, victimisation or unfair labour practice. Therefore, there was no error of law committed by the Industrial Court. (para 20)

Case(s) referred to:
Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 53

For the applicant - Anand Ponnudurai; M/s Bodipalar Ponnudurai Nathan
For the 2nd respondent - Dato' T Thavalingam; M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Aziah Ali J:

[1] This is an application for order of *certiorari* pursuant to O. 53 of the Rules of the High Court 1980 to quash the award of the Industrial Court No. 1275 of 2008 dated 23 July 2008. The issue before the Industrial Court is whether the termination of the contract of service of the applicant prematurely by the 2nd respondent ie, with a balance of 38.5 months of the five years fixed term but with payment of compensation as provided in the applicant's contract of employment as negotiated and agreed upon by the applicant and the 2nd respondent constituted a dismissal without just cause or excuse.

[2] The Industrial Court concluded that the termination of the applicant's contract of employment by the 2nd respondent was upon mutual agreement as stipulated in the contract of employment with the payment of compensation being duly honoured and accepted and/or received by the applicant and thus, such termination was with just cause or excuse. Consequently the Industrial Court dismissed the applicant's application. I agree with the Industrial Court and dismissed the applicant's application for *certiorari* with costs to be taxed unless agreed. The applicant now appeals against my decision.

Background

[3] The claimant commenced employment with the 2nd respondent as its Executive Vice President-Customer Facing Unit on 15 January 2002 with a monthly salary of RM50,000. The applicant's employment contract was for a fixed term of five years. The terms and conditions of the applicant's appointment were initially as stipulated in an undated letter of offer of employment from the 2nd respondent which was duly accepted by the applicant on 10 January 2002. Subsequently prior to commencing employment with the 2nd respondent, pursuant to discussions with the Chairman and Executive Director of the 2nd respondent, the 2nd respondent issued a letter dated 7 January 2002 stipulating that the terms and conditions contained in the said letter shall be enforceable from the date of commencement of employment with the 2nd respondent as if those terms and conditions were part of the earlier undated letter. The letter dated 7 January 2002

A contained varied and amended terms. The applicant agreed to join the 2nd respondent only upon finalization of the terms of the contract.

[4] The terms as varied and accepted by the applicant relevant
B to the application are as follows:

Item 8: Termination of Service

Your employment may be terminated by either party giving to the other three (3) months' notice in writing or payment of salary-in-
C lieu of such notice.

Where the employment is terminated by the Company, the Company shall pay compensation to you as follows:

If you are terminated during

D

(i) Year one: 60% of the balance of the total salary remuneration of remaining unfulfilled years of service plus RM five (5) million.

(ii) Year two: 70% of the balance of the total salary
E remuneration of remaining unfulfilled years of service plus RM Four (4) million.

(iii) Year three: 80% of the balance of total salary remuneration of remaining unfulfilled years of service plus RM Three (3) million.

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(iv) Year four: 90% of the balance of total salary remuneration of remaining unfulfilled years of service plus RM Two (2) million.

(v) Year five: 100% of the balance of total salary remuneration
G of remaining unfulfilled year of service plus RM One (1) million.

No compensation shall be payable by the Company if you are terminated due to any criminal offence committed by you against the Company.

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Item 24: Changes to the terms of employment

The Company reserves the right to make changes to the working hours as stated in item 5. Other terms and conditions of employment may only be changed or varied by mutual consent.

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Item 28: Change in Management or Control

In the event that there is a change in management or control of the Company as a result of a take-over or merger or acquisition by other party, or in the event Tan Sri ceases to be a director or Chairman of the Company,

(i) You shall have the right either to terminate your contract of employment by giving at least one month's notice in writing to the Company or to continue your employment under the new management and under the current terms and conditions as stated in the Letter of Offer (and as amended and varied herein) and the Company hereby undertakes to honour these contractual terms.

Your right to terminate your contract of employment due to any change in the management or control of the Company shall lapse if you do not exercise it within (12) twelve months from the date of the change in management or control.

(ii) In the event that you choose to terminate your contract of employment, or if your contract of employment is terminated by the new management of the Company, the Company shall pay you compensation based on the formulae set out in Item 8 (Termination of Service) of the Letter of Offer (as amended and varied herein) within one (1) month after the termination.

[5] According to the evidence of the 2nd respondent's witness Dato Mohamed Yunus Ramli bin Abbas, the Group's Chief Executive Officer, at the material time the terms of the applicant's employment contract in particular on termination of service were peculiar to the applicant as this was what the applicant and the 2nd respondent had negotiated and agreed upon.

[6] The 2nd respondent was undergoing an integration process as a result of the merger with Celcom Mobile Sdn Bhd (formerly known as 'TM Cellular Sdn Bhd') ("CMSB"). In his letter dated 2 April 2003 to the Group Chief Executive Officer of the 2nd respondent, the applicant acknowledged the integration process and existence of the new structure and that the 2nd respondent would be operating under a new significant shareholder and business environment as follows:

A Following this development, I would respectfully refer to my earlier correspondence and discussion on my employment contract obligations and would appreciate very much if you can allocate me some time for me seek your thoughts on what role, if any that you or the Company has for me in the new structure so that I can also plan ahead with the benefit of your counsel and advice.

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I realize the new Celcom will operate under a new significant shareholder and business environment. It is certainly quite different from the old Celcom that I signed on more than a year ago. I would surmise that the expectations of me by the last
C management and the new one would be different as a consequence. It is my intention to find out what shape this will take and especially your views and vision so that I can take this on board early.

[7] The 2nd respondent says that the merger with CMSB
D compelled the 2nd respondent to re-evaluate various aspects of its business operations including the remuneration and benefits payable to all employees. The 2nd respondent had numerous discussions with the applicant in respect of the same. On or about September 2003 the Group Chief Executive Officer of the 2nd
E respondent intimated to the applicant that pursuant to a review by its consultants, the 2nd respondent intended to review the applicant's contract. The applicant expressed his concern *vide* a letter dated 7 October 2003 and also notified the 2nd respondent that the additional financial benefits given to him after several
F months of negotiations formed a key motivating factor for the applicant to uproot himself as an Executive Director of Astro and a director of Maxis to join the company.

[8] On 16 October 2003 the 2nd respondent issued a letter to
G the applicant with several proposals to review the applicant's terms and conditions of service and requested the applicant to revert to the 2nd respondent on or before 22 October 2003. In the letter it was stated that the proposals were necessary to achieve a harmonization of the terms and conditions of
H employment of senior management. By a letter dated 22 October 2003 the applicant disagreed to the proposals. The applicant also put on record his discussion with the Group Chief Executive Officer wherein the applicant was advised that if the applicant did not accept the 2nd respondent's proposals, arrangements would
I be made for the termination of his employment.

[9] Pursuant to the applicant's rejection of the proposed review of his terms and conditions of employment, the 2nd respondent issued a letter dated 27 October 2003 to the applicant the contents of which are *inter alia* as follows:

> As you are well aware, the recent merger has compelled the Company to re-evaluate various aspects of our business operations including the remuneration and benefits payable to our employees.
>
> I have had numerous discussions with you on this issue particularly involving a revision of the remuneration package you are currently receiving. In fact, we had issued you a letter dated 16 October 2003 setting out our proposals to review the terms and conditions of your employment. We regret to note that as indicated in your reply dated 22 October 2003 you are not agreeable to the same. This disables us from achieving the desired results of our integration exercise, the aim of which, amongst others, is to ensure uniformity in the remuneration and benefits package for senior management.
>
> In the circumstances, taking into account the foregoing considerations, you have left me with no alternative but to exercise our contractual rights, that we have mutually agreed upon, pursuant to Item 8 of the Contract of Employment to terminate your services as Executive Vice President, Customer Facing Unit with effect from 1 November 2003.
>
> Pursuant to the terms of your Contract of Employment, you will be paid the following sums, subject to statutory deductions and amount owing to the company (if any):
>
> Three months' salary *in lieu* of notice of termination totaling the sum of RM150,000.00
>
> Compensation as detailed at Clause 8 of the Contract of Employment, ie, Year Two: 70% of the balance of the total salary remuneration of remaining unfulfilled years of service plus RM Four (4) million:
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> (38.5 x 50,000.00 x 70 %) + 4,000,000.00
> RM5,347,500.00
>
> Prorated Contractual Bonus (16/01/03 - 01/11/03) totaling RM79,167.00,
>
> Prorated Annual Leave Balance of 6 days totaling RM11,540.00.

A **Submissions For Applicant**

[10] Counsel for the applicant submits that the Industrial Court Chairman had committed several errors of law and the award is perverse. It is submitted that the only reason the applicant's
B contract was terminated prematurely was due to his refusal to agree to the proposal of the 2nd respondent to vary the terms and conditions of his contract of employment, submits that his refusal to vary his terms and conditions of employment cannot by any stretch of imagination constitute just cause and excuse to
C giving the 2nd respondent the contractual right to terminate the contract of employment. It is submitted that the learned Chairman's decision in holding that the 2nd respondent has the right to terminate the applicant's contract is not only perverse but is against the statutory intendment of s. 20 of the Industrial
D Relations Act 1967 which was enacted to provide security of tenure to employees.

[11] Counsel submits that a termination clause with payment of compensation does not confer upon an employer the right to
E terminate the employment of an employee without just cause or excuse. It is submitted that that the 2nd respondent is entitled to end the services of the applicant by invoking the termination clause makes the existence of the Industrial Relations Act 1967 and the Industrial Court redundant as employers can hire and fire at will
F by simply invoking the termination clauses in the contract of employment and making payment pursuant to the contract. Therefore it is submitted that the Industrial Court has committed a serious error of law.

[12] It is further submitted that the Industrial Court erred in
G holding that the need for review of the applicant's salary was due to the merger exercise because when the merger took place, the applicant was offered to join the new merged entity with salary and all other terms and conditions remaining unchanged. Therefore it is submitted that it is inequitable for the 2nd respondent to
H claim that the proposal for a salary revision was due to the merger exercise.

[13] Counsel further submits that the Industrial Court erred when the Industrial Court failed to take into account that the applicant's
I claim was for reinstatement and not a contractual claim and has wrongly applied the doctrine of estoppel which does not apply to

industrial adjudication. Further counsel submits that the Industrial Court erred when it took into account the fact that the applicant was paid a substantial amount of compensation based on contract was sufficient enough to exonerate the 2nd respondent from any blame for terminating the applicant's employment without just cause or excuse.

Submissions For 2nd Respondent

[14] For the 2nd respondent it is submitted that this is a case of termination by mutual agreement where parties had negotiated and agreed at the commencement of employment a "key clause" relating to early termination and the mode and manner in which the agreement could be brought to an end. There was *consensus ad idem*. The 2nd respondent says that the applicant negotiated a favorable compensation package in the event of early termination of his fixed term contract. The applicant had called it a 'safety clause'. The 2nd respondent submits that this clearly evinced that the applicant had full knowledge and accepted the fact that his contract may be prematurely terminated. Counsel submits that this case can be distinguished from the case of *Dr A Dutt v. Assunta Hospital (supra)* and *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30 as in this case it is a mutual separation situation where the termination clause and the notice period included a compensation scheme for which the applicant had negotiated and benefited. This clause was a 'key condition' to his employment. Both parties had mutually agreed in meticulous detail the compensation to be paid in accord to the varying stages of termination. Counsel submits that the applicant's stand is inconsistent as he now argues that the 2nd respondent cannot rely upon a clause that he had painstakingly negotiated.

[15] The 2nd respondent contends that the applicant's termination was in accordance with the terms and conditions of his contract of employment which was mutually agreed upon, and hence was with just cause and excuse. The applicant had mutually negotiated an early departure for financial consideration and this constitutes just cause and excuse for the 2nd respondent to terminate the applicant's services. The applicant has been paid 70% of the balance of the total salary remuneration of the remaining unfulfilled years of his fixed term contract plus RM4

A million as provided for under Item 8(ii) of his contract. It is submitted that it would be inequitable for the applicant to be unjustly enriched under the guise of "unfair dismissal" when the applicant has accepted three months' salary *in lieu* of notice, compensation as stipulated in cl. 8 of his contract of employment,
B prorated contractual bonus and prorated annual leave balance. On the issue of reinstatement counsel for the 2nd respondent submits that reinstatement is not a remedy as the applicant's contract period of five years has expired since January 2007.

C **[16]** The Industrial Court found that parties had foreseen the possibility of earlier termination of the employment contract and had made provisions which parties have taken time to negotiate and agree upon to provide for such eventuality. As the applicant had testified under cross-examination, "If there was a change of
D management, the company would still have to pay me in accordance with the compensation as agreed ... This was a safety clause for me and it was common in the industry.". In the award the Chairman of the Industrial Court found that:

E (a) the 2nd respondent did not challenge the fact of dismissal or termination but contended that the termination was with just cause or excuse;

(b) that the contract of employment had categorically provided for the specific clause that either party may terminate the
F applicant's employment by giving three months' notice in writing or payment of salary *in lieu* of notice;

(c) that the 2nd respondent had exercised the mutually agreed contractual right to terminate and has also honoured whatever
G contractual dues that had to be honoured in favour of the applicant according to the terms and conditions of the said contract;

(d) that the termination in this case is distinguishable from
H termination simpliciter as in the applicant's case apart from the three months' notice, a table of compensation was agreed upon to be the compensation payable in the event the 2nd respondent terminates the applicant's employment before the expiry of the five year fixed term.

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[17] In any event the Industrial Court opined that in equity, parties should be allowed to exercise the respective contractual right basing on the agreed termination clause. The Industrial Court found that the termination of the applicant's contract of employment was upon mutual agreement stipulated in the said contract and that the 2nd respondent had complied with Item 8 and had paid the compensation accordingly.

[18] According to the letter of termination the 2nd respondent stated that 'the recent merger has compelled the company to re-evaluate various aspects of our business operations including the remuneration and benefits payable to our employees.' The 2nd respondent further states that 'We regret to note that as indicated in your reply dated 22 October 2003 you are not agreeable to the same. This disables us from achieving the desired results of our integration exercise, the aim of which, amongst others, is to ensure uniformity in the remuneration and benefits package for senior management'. This has not been challenged.

[19] In *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304, the Federal Court held that the so-called 'termination simpliciter' ie, a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse. Similarly in the case of *Goon Kwee Phoy v. J&P Coats (M) Sdn Bhd* [1981] 1 LNS 30 the Federal Court said *inter alia* that:

> termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation *in lieu* of reinstatement.

Hence termination with due notice and with just cause or excuse would not amount to a dismissal.

[20] Having considered the evidence I agree with counsel for the 2nd respondent and with the Industrial Court that early termination of the applicant's contract of employment was contemplated at the time parties entered into the contract. Hence provision was made as per cl. 8. The applicant had called it a 'safety clause'. I agree with the Industrial Court that cl. 8 is not a termination clause simpliciter. It is a negotiated termination clause with financial compensation according to agreed formulae.

A This is a case or lawful termination in accordance with the contract as mutually agreed. The 2nd respondent has explained why the contractual right to terminate was exercised. The underlying reason for the termination was a genuine business reason and not a colourable exercise of power or as a result of
B victimization or unfair labour practice. I do not find any error of law committed by the Industrial Court. For the aforementioned reasons I dismissed the application for *certiorari* with costs to be taxed unless agreed.

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